

**EMPLOYEE SERVICE DETERMINATION**  
**Southern Pacific Transportation Company**  
**Nurse Consultants**

This is the determination of the Railroad Retirement Board concerning the status of nurse consultants who performed services for Southern Pacific Transportation Company (BA No.1713) (SPTC) as employees under the Railroad Retirement Act (45 U.S.C. §231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.) (RUIA).

Background

The Board's Division of Audit and Compliance conducted an audit of SPTC to determine the accuracy of creditable compensation and service reporting under the RRA and the RUIA. The nurse consultants were identified through a review of IRS Forms 1099 "Miscellaneous Income" and accounts payable invoices issued by SPTC to individuals treated as independent contractors. Because the audit found that those individuals worked for SPTC for extended periods of time on SPTC property, the question was raised as to whether they were properly classified as independent contractors. SPTC's comments on the coverage report relating to the nurse consultants are noted in the discussion below.

The scope of the investigation was limited to obtaining an understanding of the services performed by the consultants and determining the number of individuals involved, the amount of compensation paid during calendar years 1991 and 1992, the period(s) of time services were provided, and whether the consultants performed service for other clients, as well as to obtain any other information necessary for the Board to make a coverage determination.

Information Gathered About Nurse Consultants

SPTC employs nurses as nurse consultants to provide medical services to sick, disabled or injured employees of the railroad or its subsidiaries to assist them in medical and/or vocational rehabilitation. An Appendix to the agreement that each consultant has with SPTC sets forth the services to be provided by the consultant. The nurse consultants provide the following services:

1. Assistance to employees of the Railroad and/or its subsidiaries for medical referrals and consultations.

2. Assistance to treating physicians in the monitoring of home exercise and explaining medical conditions to employees of the Railroad and its subsidiaries.
3. Assistance in the establishment and ongoing relationship between the Railroad and/or its subsidiaries and medical facilities for urine and toxicological testing.
4. Assistance to the Railroad's Medical Department to obtain pertinent medical evaluations, and request, obtain, review and retain medical reports and documents, including diagnostic tests.
5. Liaison between management, employees, and the Railroad medical department.
6. Visitation of sick, disabled or injured employees of the Railroad and/or its subsidiaries to assist them in their medical and/or vocational rehabilitation.
7. The provision of assistance to physicians and medical facilities in providing consultants, transportation, and other medical services requested by the Railroad, authorized treating physicians, or facilities.

The nurse consultant's agreement provides that services "shall" be performed "a maximum of 40 hours per week" and a maximum of 5 business days per calendar week. The agreement contains a provision that requires prior clearance from SPTC's Chief Medical Officer's office in San Francisco before the nurse consultant is permitted to work any additional days beyond the stated maximum.

Nurse consultants interact daily with sick or injured employees, conduct medical and safety training programs and update supervisors on the status of employee medical conditions and determine possible dates employees can return to work. Nurse consultants also meet regularly with other SPTC employees in the claims, operating, maintenance of way, safety, and superintendent's offices, and with attorneys handling settlement of employee injury claims.

SPTC employed the services of nine nurse consultants during the calendar years 1991 and 1992. All but one of the nine nurse consultants currently provide service to SPTC. Many of those individuals have provided service in prior and subsequent years. SPTC has used nurse consultants from 1976 through the present. The nurse consultants surveyed by the Division of Audit and

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Compliance have worked for SPTC from a minimum of four years to a maximum of 18 years.

Most nurse consultants surveyed work on SPTC property or property leased to SPTC or one of its subsidiaries. At some locations, office space is shared or adjacent to the claims department. SPTC commented that seven of the nurse consultants employed by SPTC provide services for other clients. SPTC also stated that many of the nurse consultants work only part time for SPTC. SPTC stated further that the nurse consultants are not required to perform their services on SPTC property. SPTC stated that the nurse consultants are provided office space if available and that some work exclusively out of their own places of business.

The nurse consultants indicate that they follow a work schedule or routine which coincides with the work hours of SPTC. The majority of nurses work from 8 A.M. to 5 P.M. on Monday through Friday. Three nurse consultants indicated that they are on call 24 hours a day, 7 days a week for medical emergencies. SPTC commented that nurse consultants set their own hours and that full-time work is not required. SPTC also stated that the company does not ask anyone to be on call for 24 hours.

Nurse consultants complete and maintain the following information and reports:

1. "Nurse Consultant Expense Reports," which detail by date the employee contact, services provided (e.g., hospital, home visit, drug screen), conferences attended, claims department personnel contacted, travel time, hours worked, mileage and expenses.
2. Medical records on injured workers from time of injury to conclusion of medical treatment.
3. Medical management reports of patients seen and treatments provided.
4. Records detailing the treatment and medical progress of employee disability injuries.
5. Records relating to the collection of specimens for drug toxicological testing.

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6. Records relating to contacts with facilities and medical providers regarding employee medical problems.
7. E-mail to San Francisco Office Medical personnel, SPTC officers, and "RTD" Drug Testing.
8. Monthly reports to the Medical Director outlining goals for each disabled/injured worker.
9. Quarterly listings of on-duty injuries.
10. Processing and approval of employee medical bills paid by Travelers Insurance Company.
11. Entry of information into SPTC Wage Continuation System for reporting purposes.

Nurse consultants indicated that they follow SPTC's Medical Department operating instructions and procedures when performing their work. Examples of procedures followed include:

1. the processing of wage continuation claims;
2. the approval and processing for payment of employee medical bills to Travelers Insurance Company;
3. procedures relating to expense reimbursement; and
4. procedures concerning the preparation of weekly and monthly reports.

Nurse consultants receive training and instruction from the Director of SPTC's Medical Department, Ms. Patricia Boynton. They also attend in-service training classes sponsored by the medical department, participate in periodic medical management meetings and seminars with employees of the claims, legal and other departments within SPTC. Two nurse consultants were found to write articles for the Medical Department's Newsletter "Health Trax" and are shown in the credits section of the newsletter to be principal contributors. SPTC commented that the training provided by SPTC to nurse consultants is minimal and not required. SPTC stated that some nurses are required by state law, and not by SPTC, to attend educational sessions to maintain their professional licenses.

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Nurse consultants assist in training and seminar programs for SPTC employees in the areas of hearing conservation, drug screening, CPR, first aid, safety and medical management meetings. SPTC commented that nurse consultants never conduct drug screening, seminars in drug and alcohol abuse programs, CPR training, or safety or first aid meetings. SPTC stated that nurse consultants occasionally assist in safety classes by explaining medical terms or arranging for another outside provider to be an instructor. SPTC also commented that some nurse consultants assist in hearing conservation programs by answering medical questions for technicians or employees.

All nurse consultants surveyed by the Division of Audit and Compliance responded that they only work for SPTC and do not provide services to any other clients. Nurse consultants indicated that they report to and are directly supervised by Ms. Patricia Boynton, Director of the Medical Department. Prior to being supervised by Ms. Boynton, they were supervised by the former medical director, Dr. Hyder.

SPTC provides all equipment, materials and supplies used by nurse consultants. SPTC provides office furniture and equipment, telephone and telephone answering machines, pagers, nationwide 800 telephone numbers, fax machines, computers, computer software, postage, printing and medical supplies used in the performance of their duties. Nurse consultants are reimbursed by SPTC for supplies purchased on their expense reports. In addition, SPTC provides office space, parking and cafeteria facilities. SPTC commented that any nurse consultant who has a mobile telephone provides it at her own expense. SPTC also commented that nurse consultants are not reimbursed for computers and that neither computers nor software are provided to all nurse consultants. SPTC stated that if an 800 number is provided, it is for the convenience of SPTC employees contacting the consultants.

Seven of the nurse consultants surveyed indicated that they are not incorporated. Only one individual was incorporated, but stated that all billings submitted for payment of services were in her own name. None of the nurse consultants advertise their services in any nurse registry or trade publication.

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Nurse consultants have SPTC business cards showing their position as Medical Consultant and are listed in the SPTC telephone book.

The Division of Audit and Compliance stated that its audit information indicated that nurse consultants have participated in SPTC safety award programs, receiving watches, shirts, gift certificates, jewelry, etc. SPTC commented that the company has no knowledge of any nurse consultant participating in an SPTC safety program and therefore receiving any type of award.

Review of Forms 1099 "Miscellaneous Income" issued by SPTC for the calendar years 1991 and 1992 show that nurse consultants were paid compensation exceeding \$307,000 in 1991 and \$350,000 in 1992.

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Discussion and Conclusions

Section 1(b) of the RRA defines the term "employee" to mean "any individual in the service of one or more employers for compensation." Section 1(d)(1) of the RRA provides in pertinent part that an individual is in the service of an employer if:

(i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations. [45 U.S.C. §231(d)(1)(i)].

Section 1 of the RUIA contains essentially the same definition.

The information summarized above indicates that two of the definitions of employee [those in sections 1(d)(1)(i)(A) and (B)] might apply to the nurse consultants. First, the Board finds that the definition in section 1(d)(1)(i)(A) applies to the nurse consultants because the evidence indicates that those consultants are subject to the continuing authority of SPTC to supervise and direct the manner in which they render their services. Specifically, the contract that SPTC enters into with the nurse consultants sets a maximum number of hours and business days that the consultants may work and requires the consultant to obtain prior clearance from the company's Chief Medical Office before working any additional days. Moreover, the nurse consultants follow a work schedule that coincides with the work hours of SPTC. The majority of nurses work from 8 A.M. to 5 P.M. on Monday through Friday.

In addition, the nurse consultants follow SPTC Medical Department operating instructions and procedures when performing their work. Nurse consultants receive training and instruction from the Director of SPTC's Medical Department. Perhaps the single most important fact is that the nurse consultants indicated that they report to and are directly supervised by, Ms. Patricia Boynton, SPTC's Director of the Medical Department, and that prior to

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being supervised by Ms. Boynton, they were supervised by the former medical director, Dr. Hyder.

The evidence gathered thus clearly indicates that the nurse consultants are subject to the continuing authority of SPTC to supervise and direct the manner of rendition of their services. The Board therefore concludes that the nurse consultants were and are employees of SPTC within the provisions of section 1(d)(1)(i)(A) of the RRA.

The evidence also shows that the nurse consultants fall within the definition of employee set out in section 1(d)(1)(i)(B) of the RRA. The Board finds that the services provided by those consultants may be considered to be professional services in that those services consist of specialized work which can be performed only by individuals who have had particularized training and education. The Board also finds that the consultants are integrated into the staff of SPTC for a number of reasons. First, SPTC employs the nurse consultants to provide medical services to sick, disabled, or injured employees of the railroad or its subsidiaries to assist them in medical and/or vocational rehabilitation. Most of the nurse consultants surveyed by the Board's Division of Audit and Compliance work on SPTC property or property leased to SPTC or one of its subsidiaries. The nurse consultants work a schedule which coincides with the work hours of SPTC. They complete and maintain a variety of information and reports concerning SPTC's employees with injuries and/or medical problems. Nurse consultants interact daily with sick or injured employees, conduct medical and safety training programs and update supervisors on the status of employee medical conditions and determine possible dates that employees can return to work. In addition, nurse consultants meet regularly with other SPTC employees in the claims, operating, maintenance of way, safety, and superintendent's offices and with attorneys handling settlement of employee injury claims.

The nurse consultants follow SPTC Medical Department operating instructions and procedures when performing their work. They attend in-service training classes sponsored by the medical department and participate in periodic medical management meetings and seminars with employees of the claims, legal, and other departments within SPTC. Two of the nurse consultants write articles for the Medical Department's newsletter and, in

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fact, are listed as principal contributors. Nurse consultants assist in training and seminar programs for SPTC employees. SPTC provides equipment, materials, and supplies used by the nurse consultants. Further, nurse consultants have SPTC business cards showing their positions as Medical Consultants and are listed in the SPTC telephone book.

The Board finds that the evidence overwhelmingly demonstrates that the nurse consultants function as an integral part of the medical department of SPTC and that they are integrated into the staff of SPTC. The Board therefore finds that the nurse consultants are employees of SPTC within the meaning of section 1(d)(1)(i)(B) of the RRA.

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**TO:** The Board

**FROM:** Catherine C. Cook  
General Counsel

**SUBJECT:** Employee Service Determination -- Southern Pacific  
Transportation Company -- Nurse consultants

Attached is a draft Board decision which finds that nurse consultants used by Southern Pacific Transportation Company (SPTC) (BA No. 1713) should be considered to be employees of the Company and not independent contractors. The information on which the draft is based resulted from an audit by the Division of Audit and Compliance to determine the accuracy of creditable compensation and service reporting under the RRA and the RUIA. The audit report also contained some information about a doctor consultant, but did not include enough information to determine whether or not SPTC was properly treating the doctor as an independent contractor. The Board may wish to have the status of the doctor consultant investigated further.